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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 LARRY DAVIS,

11 Plaintiff,

12 v.

13 MARTHA KARR et al.

14 Defendants.

CASE NO. C11-5998-RBL-JRC

REPORT AND RECOMMENDATION

NOTED FOR: APRIL 27, 2012

15 This 42 U.S.C. §1983 civil rights matter has been referred to the undersigned Magistrate
16 Judge pursuant to 28 U.S.C. §§ 636 (b)(1)(A) and (B) and Local Magistrate Judge Rules MJR 1,
17 MJR 3, and MJR 4. Defendants have filed a motion to dismiss this action for failure to exhaust
18 administrative remedies (ECF No. 10). In the proposed order, defendants ask for dismissal with
19 prejudice. Plaintiff has not responded. The Court recommends that the motion be granted and
20 that the action dismissed, but that the dismissal be without prejudice.

21 Plaintiff complains about the conditions and sanitation at the Pierce County Jail (ECF No.
22 4). The Prison Litigation Reform Act ("PLRA") requires plaintiff to exhaust whatever
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1 administrative remedies are available to him prior to filing a complaint in federal court. The
2 relevant portion of the act states:

3 No action shall be brought with respect to prison conditions under section 1983 of
4 this title, or any other Federal law, by a prisoner confined in any jail, prison, or other
5 correctional facility until such administrative remedies as are available are
6 exhausted.

7 42 U.S.C. § 1997e(a).

8 Here, plaintiff filed this action while incarcerated and the act applies to him. See 42
9 U.S.C. §1997 e (h). The statute defines “prisoner” to include any person confined in a facility
10 for a violation of criminal laws, including persons accused of or convicted of crimes.

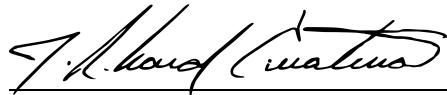
11 Having determined that the act applies to plaintiff, it is clear that he did not exhaust his
12 available remedies. Defendants show that plaintiff has never filed a grievance (ECF No. 11,
13 Declaration of Pam Lacipierre). The action should be dismissed without prejudice so plaintiff
14 may exhaust his claims. Until the claims are exhausted, they may not be maintained in federal
15 court.

16 In the Ninth Circuit, failure to exhaust administrative remedies has historically resulted in
17 dismissal without prejudice. Wyatt v. Terhune, 315 F.3d 1108 (9th Cir. 2003). It is an affirmative
18 defense, not a pleading requirement. Wyatt, 315 F.3d at 1117. It is not a decision on the merits
19 and should be treated as a matter in abatement. Wyatt, 315 F.3d at 1119. Matters in abatement do
20 not normally reach the merits. Accordingly the Court recommends that this action be
21 DISMISSED WITHOUT PREJUDICE.

22 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
23 fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P.
24 6. Failure to file objections will result in a waiver of those objections for purposes of de novo
review by the district judge. See 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit

1 imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on April
2 27, 2012, as noted in the caption.

3 Dated this 4th day of April, 2012.

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6 J. Richard Creatura
7 United States Magistrate Judge
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